1992

# David Blaine v. Pamela Bradshaw (Blaine) : Brief of Appellant

Utah Court of Appeals


Harry Caston; McKay, Burton & Thurman; attorneys for appellee.
Brian M. Barnard, John Pace; Utah Legal Clinic; attorney for appellant.

**IN THE COURT OF APPEALS**
**OF THE STATE OF UTAH**

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| **DAVID BLAINE,** | : | |
| Plaintiff/Appellee, | : | |
| vs. | : | Case No. 92-0734-CA |
| **PAMELA BRADSHAW (BLAINE),** | : | |
| Defendant/Appellant. | : | Priority No. 15 |

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# BRIEF OF APPELLANT

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APPEAL FROM A DECISION ENTERED BY
THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
THE HONORABLE ANNE STIRBA, JUDGE PRESIDING
(Case No. Below 86-490-0291)

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### I. Cases



### II. Statutory Provisions

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| | | |
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BRIEF OF APPELLANT

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**DEFENDANT/APPELLANT**, Pamela Bradshaw ("Ms. Bradshaw"), by and through counsel, Brian M. Barnard of the Utah Legal Clinic, pursuant to the Utah Rules of Appellate Procedure, submits the following **BRIEF** in support of her appeal:

## JURISDICTION

Ms. Bradshaw brings this appeal from a decision by the Third District Court in and for Salt Lake County, State of Utah. The district court granted in part and denied in part Ms. Bradshaw's petitions to modify the parties' divorce decree. Ms. Bradshaw now seeks this Court's reversal of portions of that decision.

This Court has jurisdiction in this action pursuant to Utah Code Annotated § 78-2a-3 (2) (h) (1953 as amended).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

### I. Issues

1. Did the district court mistakenly refuse to make Mr. Blaine's increased child support obligations retroactive to when he received notice of the Petition for Modification on the basis of a misinterpretation of Utah Code Ann. § 78-45-7.2 (6) (1953 as amended)?

2. Did the district court improperly refuse to restore to Ms. Bradshaw, as the custodial parent, the tax dependency exemption for the parties' minor child without making any factual findings, although the parties stipulated that a legally sufficient change in their circumstances required that there be a modification of their existing order?

### II. Standard of Review

There are no disputed facts in this case. Because Ms. Bradshaw accepts the district court's findings of facts and challenges only the lower court's legal conclusions, this court should review the decision below for correctness and should afford no deference to the district court's conclusions. Whitehead v. Whitehead, 836 P.2d 814 (Utah App. 1992); Smith v. Smith, 793 P.2d 407, 409 (Utah App.

1990). A determination, based on stipulated facts, of whether there are sufficient grounds to modify an award of a tax dependency exemption is a legal conclusion subject to full review by this Court.

Although a decision to make an increase in child support retroactive is a matter of discretion to be exercised by a trial court, the trial court must make appropriate and adequate findings to support its conclusion. Accordingly, this Court should review the order concerning retroactivity for abuse of discretion and should determine the adequacy of the findings to support the trial court's exercise of discretion. Hill v. Hill, 841 P.2d 722 (Utah App. 1992); Motes v. Motes, 786 P.2d 232 (Utah App. 1989); Jefferies v. Jefferies, 752 P.2d 909, 911-12 (Utah App. 1988).

## DETERMINATIVE STATUTORY PROVISIONS

The statutory provisions determinative in this action are:

Utah Code Annotated § 30-3-5 (3) (1953 as amended).

> The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of property as is reasonable and necessary.

Utah Code Annotated § 30-3-10.6 (2) (1953 as amended).

> A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

Utah Code Annotated § 78-45-7.2 (6) (1953 as amended).

> With regard to child support orders, enactment of the guidelines and any subsequent change in the guidelines constitutes a substantial or material change of circumstances as a ground for modification of a court order, if there is a difference of at least 25% between the existing order and the guidelines . . . .

## STATEMENT OF THE CASE

### I. Nature of the Case

The interpretation of two Utah statutory provisions lie at the heart of this case: Utah Code Ann. §§ 78-45-7.2 and 30-3-10.6 (2). Initially, this Court must construe Utah

Code Ann. § 78-45-7.2 (6) (1953 as amended), which declares that a 25% difference between an existing order for child support and the amount prescribed by the guidelines will establish a substantial change of circumstances as a ground for modification of the existing order. While this provision asserts that the 25% figure is a **sufficient** basis for modification of an existing support order, the trial court concluded that a 25% difference is **necessary** for a modification -- that in the absence of a 25% change between an existing child support obligation and the obligation determined under guidelines, there is no change in circumstances substantial enough to warrant a modification of the existing order. At the onset, this court must determine the validity of the trial court's reading of Utah Code Ann. § 78-45-7.2 (6).

Secondly, this court must determine what findings a trial court must make before it can refuse to modify an existing court order to award the custodial parent a tax dependency exemption. Although the parties in this case stipulated that a substantial change in circumstances warranted an increase in Mr. Blaine's child support obligations, the trial court failed to give a basis for its decision that there was not a sufficient change to warrant altering the portion of the existing decree which awarded to

Mr. Blaine the right to claim the tax dependency exemption. This Court must determine whether this decision can be appropriately made by the trial court without any factual findings. A copy of the original 1986 decree is attached as Exhibit "E".

## II. Course of Proceedings and Disposition Below

On April 22, 1991, Ms. Bradshaw served Mr. Blaine with a Petition for Modification, (Exhibit "A"), which maintained that a substantial change of circumstances, not contemplated in the original divorce decree, necessitated a modification of the decree. Subsequently, on May 19, 1992, Ms. Bradshaw filed a Supplemental Petition to Modify the divorce decree. Exhibit "AA". Both of these petitions were heard on September 3, 1992, by the Honorable Anne Stirba, Third Judicial District Court Judge. On the facts stipulated to by the parties, Judge Stirba granted in part and denied in part Ms. Bradshaw's petitions. The trial court's ruling were embodied in the Amended Findings of Fact and Conclusions of Law, (Exhibit "B" attached), and an Order and Judgment, (Exhibit "C" attached), dated October 21, 1992 and October 19, 1992, respectively.

Ms. Bradshaw now appeals the portions of Judge Stirba's decision and order which:

(1) denied her request to order Mr. Blaine to pay increased child support as of the date he was served with the Petition for Modification (April 22, 1991), and

(2) denied her request to award her, as the custodial parent, the right to claim the child Allison as a dependent for the purposes of an income tax exemption.

Ms. Bradshaw's notice of appeal was dated October 30, 1992 and was timely filed.

## III. Statement of Facts

The pertinent facts regarding Ms. Bradshaw's petitions for modification, (Exhibits "A" & "AA" attached), were uncontested and were stipulated to by the parties. These facts are recited in the Amended Findings of Fact signed by the trial court. (Exhibit "B" attached). Those undisputed facts are:

1. The parties were divorced in 1986 when plaintiff/appellee, David Blaine ("Mr. Blaine") was a full time college student and his income was less than eight hundred dollars (<$800.00) per month. Ms. Bradshaw was employed full time as a school teacher at that time. Amended Findings, ¶ 1, Exhibit "B" attached.

2. Since the divorce Mr. Blaine has completed his college education and is now employed full time by IBM in

New York State earning three thousand eighty-one dollars ($3,081.00) per month. Amended Findings, ¶ 2, Exhibit "B" attached.

3. Ms. Bradshaw currently earns one thousand sixty-five dollars ($1,065.00) per month working half time as a public school teacher. Amended Findings, ¶ 3, Exhibit "B" attached.

4. Allison, the child of the parties, was three (3) years old when the divorce occurred and is now nine (9) years of age. The cost of caring for a nine (9) year old child today is greater than for caring for a three (3) year old child six years ago. Amended Findings, ¶ 4, Exhibit "B" attached.

5. The original decree entered May 2, 1986 provided that Mr. Blaine would pay a maximum of two hundred and fifty dollars ($250.00) per month in child support when his income exceeded one thousand two hundred and fifty dollars ($1,250.00+) per month. The original decree had provisions for escalation of child support as Mr. Blaine's income increased, but contained no provision for escalation after plaintiff's income substantially exceeded one thousand two hundred and fifty dollars ($1,250.00+) per month. Amended Findings, ¶ 5, Exhibit "B" attached.

6. The original decree provided that for the years 1986 - 1989 inclusive Ms. Bradshaw could claim Allison as a dependent and receive an exemption for income tax purposes. The original decree and existing order provided that for the year 1990 and each year thereafter Mr. Blaine could claim Allison as a dependent and receive an exemption for income tax purposes. When the decree was entered the parties anticipated that in 1990 Mr. Blaine would be earning more than Ms. Bradshaw and that at that time he would have greater use for the tax dependency exemption. Amended Findings, ¶ 6, Exhibit "B" attached.

7. Mr. Blaine was served with the petition for modification on April 22, 1991. Amended Findings, ¶ 8, Exhibit "B" attached.

8. In April, 1991 Mr. Blaine was earning only two thousand eight hundred fifty-two dollars ($2,852.00) gross monthly salary working for IBM. In April, 1991 Ms. Bradshaw was earning one thousand eight hundred seventy-three dollars ($1,873.00) gross per month working full-time as a school teacher. Amended Findings, ¶ 9, Exhibit "B" attached.

9. Under the statutory support guidelines, in April, 1991, Mr. Blaine's child support obligation to the Ms. Bradshaw, if then recalculated, would have been two hundred ninety-five dollars ($295.00) per month. This sum

represents less than a twenty-five percent (<25%) increase in Mr. Blaine's support obligation under the guidelines from the existing court order ($250.00) which was in effect in April 1991. Amended Findings, ¶ 10, Exhibit "B" attached.

10. On or about October 15, 1991, the Mr. Blaine received an increase in his monthly gross income and since that date has been earning three thousand eighty-one dollars ($3,081.00) gross per month. Amended Findings, ¶ 11, Exhibit "B" attached.

11. Ms. Bradshaw claimed in her Petition to Modify that there was a substantial change in circumstances which allowed the trial court to reconsider and increase child support which as well allowed the trial court to reconsider and modify the decree with regard to which parent could claim Allison as a dependent for income tax purposes. The parties agreed that there was a substantial change in circumstances which allowed the trial court to reconsider and increase child support. Amended Findings, ¶ 13, Exhibit "B" attached.

12. Other than the foregoing, Ms. Bradshaw presented no evidence to show a change in circumstances of the parties or to justify increasing child support or altering the award of the tax dependency exemption allowance. Amended Findings, ¶ 14, Exhibit "B" attached.

13. The parties stipulated that all of the foregoing facts were true and correct for the purpose of settlement of certain issues and for the purpose of presentation to the trial court of various pending legal issues as raised by the pleadings on file. Amended Findings, ¶ 15, Exhibit "B" attached.

## SUMMARY OF ARGUMENT

The district court made two errors when it refused to grant portions of Ms. Bradshaw's petitions for modification of the parties' divorce decree. First, the district court misinterpreted Utah Code Ann. § 78-45-7.2 (6) when it concluded that the statute prevented Mr. Blaine's obligation to pay increased child support from being retroactive to the date he was served with the Petition for Modification ("petition").

Section 78-45-7.2 (6) Utah Code Ann. (1953 as amended), establishes that a 25% or more difference between an existing child support order and an obligation under Utah's child support guidelines is sufficient -- by itself -- to prove a substantial change in circumstances as a ground for modification of the existing order. Importantly, the statute does **not** suggest in any way that a modification of

an existing order is only appropriate when this 25% difference is present.

However, the trial court adopted this latter and improper reading of § 78-45-7.2 (6), refusing to make Mr. Blaine's increased child support obligations retroactive to before October 15, 1991, simply because the 25% difference did not then exist. The trial court offered no other reasoning of findings for its conclusion. At the same time, the trial court ignored that the parties stipulated that three factors unrelated to the impact of the guidelines created a substantial change in circumstances. Because two of these factors were in existence on the date Mr. Blaine was served with the petition, the increase in his child support obligation should be made retroactive to the date of that service -- April 22, 1991.

Second, the district court failed to give any reasons or findings to support its decision that -- although the parties' had stipulated that a substantial change in their circumstances warranted a modification in their existing child support agreement -- this change did not justify modifying the existing decree to allow Ms. Bradshaw, as the custodial parent, to claim Allison as her dependent for the purposes of income taxes. This lack of appropriate findings was improper for several reasons.

Because Utah's child support guidelines assume that the tax dependency exemption is awarded the custodial parent, allocation of the exemption to the noncustodial parent runs contrary to the guidelines and requires explanation. Recently, this Court held that failure to follow the statutory child support guidelines absent findings of special circumstances is reversible error. Similarly, this Court determined that both federal tax law and the best interests of the child dictate that only when exceptional circumstances exist can the tax exemption be awarded to the noncustodial parent. However, no findings were made in this case to justify allowing Mr. Blaine to continue to claim Allison as his dependent. Indeed, given the stipulated facts, the tax dependency exemption cannot be properly awarded to the noncustodial parent. Again, trial court error demands the intervention of this Court to require that the tax exemption be granted to Ms. Bradshaw as the custodian of Allison.

Because the parties have stipulated to the facts pertinent to this action and this Court is in as good a position to consider these facts as was the trial court, this Court is to draw its own legal conclusions from the facts. Accordingly, this Court should direct the trial court to enter an order establishing that Mr. Blaine's child

support obligation should be retroactive to the date he received notice of the petition and that, commencing with 1992, Ms. Bradshaw should be again awarded the tax dependency exemption for Allison.

## ARGUMENT[1]

### I. Mr. Blaine's Increased Child Support Obligation Should Be Made Retroactive to the Date He Received Notice of the Petition for Modification of the Parties' Divorce Decree.

The trial court erred in denying Ms. Bradshaw's request to make Mr. Blaine's increased child support obligation to Allison retroactive to when he was served with the petition (April 22, 1991). Although the trial court has broad discretion to determine whether a modification in support should be retroactive, there must be adequate findings or conclusions to support the exercise of that discretion. Importantly, the trial court herein defended its decision only by reference to Utah Code Ann. § 78-45-7.2 (6) (1953 as amended). However, because its analysis was based on improper interpretation of § 78-45-7.2 (6), the trial court necessarily failed to provide adequate findings to justify its decision.

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[1] As a preliminary matter, Ms. Bradshaw wants to clarify that she properly petitioned the trial court to modify the parties' divorce decree. Utah Code Ann. § 30-3-5 (3) (1953 as amended) provides that a district court granting a divorce maintains continuing jurisdiction to modify the decree with regard to support and maintenance of minor children. A substantial change of circumstances of the parties, not contemplated in the decree, justifies modification of divorce decree. Ostler v. Ostler, 789 P.2d 713 (Utah App. 1990). Because she was able to establish a substantial change in her own circumstances and those of Mr. Blaine, Ms. Bradshaw properly petitioned the Third Judicial District Court to modify the parties' divorce decree.

In absence of adequate findings below and given the stipulated facts, this court should grant Ms. Bradshaw's request, ordering Mr. Blaine's increased child support obligation to be retroactive to April 22, 1991. The parties stipulated to three factors which established substantially changed circumstances and required modification of their existing child support agreement. Because two of these factors were present on April 22, 1991, the modification of the existing decree should be made effective as of that date.

**A. The Trial Court Must Provide Adequate Findings for its Decision Not to Make Mr. Blaine's Increased Child Support Obligation Retroactive to April 22, 1991.**

Utah Code Ann. § 30-3-10.6 (2) (1953 as amended) grants discretion to a trial court to make child support modification retroactive to the date notice of petition given to the adverse party. However, this Court determined in Crockett v. Crockett, 836 P.2d 818, 820 (Utah App. 1992), that retroactive modification of a decree is at discretion of trial court, provided the court bases its decision upon appropriate findings. Without findings by the trial court, the parties are in no position to assess or challenge the trial court's decision. Id. at 820-821; Crouse v. Crouse, 817 P.2d 836, 838 (Utah App. 1991). In addition, without

factual findings and documented reasoning by the trial court, the appellate court is unable to review the proceedings below. Id.; *See also*, Allred v Allred, 835 P.2d 974 (Utah App. 1992) (trial court must specify in its findings the reasons a tax exemption is not given to the noncustodial parent); Ostler v. Ostler, 789 P.2d 713, 715 (Utah App. 1990) (trial court must enter findings of fact on factors which constitute material issues); Motes v. Motes, 786 P.2d 232 (Utah App. 1989); Jefferies v. Jefferies, 752 P.2d 909 (Utah App. 1988).

When determining child support awards, including the retroactive effect of any modifications of these awards, the trial court must take into account "'not only the needs of the child[], but also the ability of the parents to pay.'" Ostler v. Ostler, 789 P.2d at 715, (*quoting* Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985)). Again, the failure of the trial court to make "specific findings on the statutory factors constitutes reversible error." Id. Similarly, the lack of sufficient findings to explain the trial court's refusal to make the modification of the parties' divorce decree retroactive to April 22, 1991, requires the intervention of this Court.

**B. Utah Code Ann. § 78-45-7.2 (6) (1953 as Amended) Does Not Restrict the Authority of Courts to Modify Existing Child Support Orders to Instances Where There Is a 25% Difference Between the Support Determined by the Existing Order and that Determined by the Guidelines.**

The only factual finding supporting the trial court's decision not to make Mr. Blaine's child support increase retroactive to the date he was served with the petition was based upon an improper reading of Utah Code Ann. § 78-45-7.2 (6) (1953 as amended). Referring to § 78-45-7.2 (6), the trial court contended:

> Under the statutory support guidelines, in April, 1991, plaintiff's child support obligation to the defendant, if then re-calculated, would have been two hundred ninety-five dollars ($295.00) per month. Said sum represents less than a twenty-five percent (<25%) increase in plaintiff's support obligation under the guidelines from the existing court order ($250.00) in effect in April 1991.

Findings, ¶ 10 at 4, Exhibit "B" attached. Clearly, the trial court was interpreting § 78-45-7.2 (6) to mean that **only** when there was at least 25% difference between an existing child support order and an obligation calculated under the "new" guidelines, could be the basis for a substantial change in the parties' circumstances for the purposes of a modification of the existing order.[2] The trial court did not explain how the factors which lead to a

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[2] There is no case law to support the trial court's improper reading of § 78-45-7.2 (6).

stipulation by the parties that a substantial change in their circumstances had indeed occurred, effected its conclusion that the increased in child support did not require that this modification be retroactive to April 22, 1991. Instead, the trial court relied exclusively on an inappropriate reading of Utah Code Ann. § 78-45-7.2 (6) (1953 as amended).

A careful reading of § 78-45-7.2 (6) indicates that this section provides that the 25% figure is a **sufficient** basis for modification of an existing support order. The statute in no way mandates that a 25% difference is **necessary** for a modification. Under § 78-45-7.2 (6), the trial court remains free to find a substantial change in circumstances on the basis of factors other than the impact of the guidelines on a calculation of child support -- the 25% is **"a ground** for modification of a court order," not the **only** ground for a modification. Utah Code Ann. § 78-45-7.2 (6) (1953 as amended) (emphasis added). The trial court can modify an existing order if it finds a material change of circumstances independent of the impact of the guidelines.[3]

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[3] That the legislature intended to allow the trial court a means independent of the 25% difference to find a substantial change in circumstances is made obvious by reference to the pre-1990 amendment provision (§ 78-45-7.2 (1)(b)) which was replaced by § 78-45-7.2 (6). Utah Code Ann. § 78-45-7.2, amendment notes (wrongly stating that §

Id. Because the trial court improperly cited § 78-45-7.2 (6) for its conclusion and failed to consider the appropriate factors to determine the retroactivity of its child support order, this court should draw its own legal conclusions from the stipulated facts. Whitehead v. Whitehead, 836 P.2d 814 (Utah App. 1992); Smith v. Smith, 793 P.2d 407, 409 (Utah App. 1990).

**C. Proper Interpretation of the Stipulated Facts Indicate that Mr. Blaine's Child Support Obligation to Allison Should Be Retroactive to April 22, 1991.**

Inappropriately applying Utah Code Ann. § 78-45-7.2 (6) (1953 as amended) to the issue of retroactivity, the trial court ignored that the parties stipulated that three (3) factors, unrelated to the impact of the guidelines, were sufficient to establish a substantial change in circumstances for the purposes of modification of Mr. Blaine's child support obligations. Because two of these factors were in existence on the date Mr. Blaine was served with the

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78-45-7.2 (1)(b) was replaced by § 78-45-7.2 (5)). The pre-1990 provision concludes that although the impact of the guidelines on existing child support orders did not constitute a substantial change in circumstances, "if the court finds a material change of circumstances independent of the guidelines," a modification is appropriate. Id. Thus, the 25% rule of thumb was meant to amend the pre-1990 reference to the impact of the guidelines, not to displace an independent finding of changed circumstances.

petition, the increase in his child support obligation should be made retroactive to the date of that service -- April 22, 1991.

The parties agreed that three factors contributed to a change in their circumstances, substantial enough to warrant a modification of their divorce decree. These factors were: (1) a large increase in Mr. Blaine's salary, (2) a decrease in Ms. Bradshaw's salary and (3) an increase in the cost of caring for Allison. On April 22, 1991, the date Mr. Blaine received notice of Ms. Bradshaw's petition, two of these factors contributed to a substantial change in circumstances. Mr. Blaine was earning two thousand eight hundred fifty-two dollars ($2,852.00) per month, **more than double** the maximum one thousand two hundred and fifty dollar ($1,250.00) monthly income anticipated by the divorce decree. In addition, the cost of caring for Allison was increasing -- she was older and inflation was causing the general cost of living to rise.

These factors alone -- independent of the impact of the guidelines upon Mr. Blaine's child support obligations -- constituted a legally sufficient change in circumstances to warrant modification of the existing order. Accordingly, the child support increase should be made retroactive to April 22, 1991. Only such an order would properly consider

"'not only the needs of the child[], but also the ability of the parents to pay,'" Ostler v. Ostler, 789 P.2d at 715, (*quoting* Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985)), and properly assure that Allison's "standard of living [is] comparable to that which [she] would have experienced if no divorce had occurred." Peterson v. Peterson, 784 P.2d 593, 596 (Utah App. 1988); Ostler, *supra* at 716.

**II. Ms. Bradshaw, as the Custodial Parent, Should Be Award the Tax Dependency Exemption for Allison.**

The trial court also erred when it refused to alter the portion of the existing decree which awards Mr. Blaine the tax dependency exemption for Allison. Although the trial court concluded that there was a sufficient change in circumstances to warrant a modification of the parties' support obligations, the trial court provided no findings or justification for its decision not to transfer the tax exemption to Ms. Bradshaw, the custodial parent. In addition, the trial court failed to address the factors specified by this court under Motes v. Motes, 786 P.2d 232 (Utah App. 1989) before it refused to grant the tax exemption to the custodial parent. Because of the inadequacy of the findings below and given the stipulated

facts, this court should reverse the trial court order and award to Ms. Bradshaw the tax exemption for Allison.

**A. Given the Parties' Substantially Changed Circumstances, the Trial Court Must Make Appropriate Findings Before it Refuses to Transfer the Tax Exemption to the Custodial Parent.**

In the presence of a material change in circumstances, the trial court must make adequate findings before it can decline to modify an existing award of a tax exemption. This Court recently held that failure to follow the statutory child support guidelines absent findings of special circumstances is reversible error. Hill v. Hill, 841 P.2d at 724. Because the trial court recalculated the parties' child support obligations in light of changed circumstances, its subsequent decision must either conform to the guidelines or be justified by adequate findings. However, the trial court departed from the guidelines without justifying the departure.

Importantly, Utah's child support guidelines assume that the custodial parent is awarded the tax dependency exemption.[4] Since 1984, when Congress amended the tax code

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[4] According to the **Utah Child Support Task Force, Report On Proposed Child Support Guidelines**, May 1988 (p. 6, ¶ I, E.), "The basic child support figures are further adjusted reflecting the assumption that the custodial parent would receive the exemptions for all children. If the

regarding exemption allowance in divorce, the custodial parent has been automatically entitled to the available dependency exemptions unless he/she signs a written declaration otherwise. 26 U.S.C. § 152(e)(2)(A) (1988); Motes v. Motes, 786 P.2d at 235-36 (recognizing a presumption created by federal law that the custodial parent receive the exemption). Indeed, in Fullmer v. Fullmer, 761 P.2d 942, 950 (Utah App. 1988), this Court insisted that it did not have the authority to grant an exemption contrary to the provisions of the Internal Revenue Code. Thus, only when the best interests of the child so requires, will the courts **order** a custodial parent to sign a declaration of waiver consistent with § 152 of tax code.[5] Allred v. Allred, 835 P.2d at 978. Finally, fairness requires that the guidelines be assumed to vest the tax exemption in the custodial parent. Realistically, the custodial parent is often faced with expenses beyond those which are contemplated and calculated by the guidelines on the basis of income alone. Indeed, any expenses which go beyond those anticipated by

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custodial parent relinquishes the exemptions, this could be grounds for an adjustment in the basic award."

[5] N.B.: Neither the original decree herein (Exhibit "E") nor the order of modification (Exhibit "C") **order** the defendant custodial parent to annually execute and deliver the necessary I.R.S. required document.

the guidelines must be met by the custodial parent alone and can only be offset by awarding the tax exemption to the custodial parent. In combination, each of the considerations -- federal law, judicial interpretation and policy concerns -- establish that the guidelines presume that the tax exemption is awarded to the custodial parent.

Several other factors mandate that the trial court satisfactorily justify its decision not to award tax exemptions to the custodial parent. Recently, this Court specified two elements to be considered before a court will order the custodial parent to waive her tax exemption:

> First, the noncustodial parent must have a higher income and provide the majority of support for the child. Second, the trial court must, from its findings, determine that by transferring the dependency exemption to the noncustodial parent . . [it is] in the best interest of the child, which in all but exceptional circumstances would translate into an increased support level for the child.

Allred v. Allred, 835 P.2d at 978. Without findings and explanation as to these requirements,[6] the trial court cannot properly determine whether to modify an existing award of the tax exemption to the noncustodial parent.

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[6] The non-custodial parent herein, Mr. Blaine was ordered in the modification to pay only the amount required under the guidelines.

Alternatively, if the trial court orders that the custodial parent give up the tax exemption, it must also justify this decision. As established in Allred, the trial court must, in such cases, "consider whether the best interests of the child require[] an increase in child support to reflect the reduction in the tax burden of [the noncustodial parent]." Allred v. Allred, 835 P.2d at 978, n.1.

Finally, adequate findings are particularly necessary to proper resolution of this case. As was true in Fullmer, 761 P.2d 942, this case does not involve an order directing that Ms. Bradshaw, as the custodial parent, give up her right to claim Allison as her dependent. *See*, Motes v. Motes, 786 P.2d at 234. Therefore, under the Fullmer doctrine, the trial court does not have the power to "grant the exemption contrary to the provisions of the Internal Revenue Code." Fullmer, 761 P.2d at 950. If the trial court wishes to order Ms. Bradshaw to annually execute and deliver the necessary document to waive her right to claim Allison as a dependent, then proper findings by the trial court justifying this action are especially appropriate.

**B. Because of a Lack of Findings and Stipulated Facts Below, this Court Should Award to Ms. Bradshaw, as the Custodial Parent, the Right to Claim the Tax Dependency Exemption for Allison.**

Because the trial court failed to adequately consider the appropriate factors necessary to rebut the presumption that the custodial parent is entitled to any available tax dependency exemptions, its decision should be vacated. In addition, because the trial court's decision was based on stipulated facts, this court should draw its own legal conclusions on the basis of these facts. Whitehead v. Whitehead, 836 P.2d 814 (Utah App. 1992); Smith v. Smith, 793 P.2d 407, 409 (Utah App. 1990).

Under Motes, two requirements must be met before a court can award a tax exemption to the noncustodial parent. First, the noncustodial parent must have a higher income and provide the majority of support for the child. Motes, 835 P.2d at 978. Although Mr. Blaine's contribution to Allison's support is 76% of the guideline total, this number alone cannot prove that Mr. Blaine provides a majority of the support for Allison. Given that the guidelines assume that the custodial parent is entitled to the tax exemption, referring to the guidelines to establish whether the noncustodial parent is entitled to the exemption would beg the question. Such reasoning would essentially allow the

court to derive the allocation of the tax exemption from guidelines which already assume the allocation of the exemption.[7]

Finally, and more clearly, Allison's best interests would be best served by allocating the tax dependency exemption to her custodial parent. As determined in Motes, in all but rare circumstances, the transfer of the dependency exemption to the noncustodial parent should be accompanied by "an increased support level for the child." Motes at 978. Yet, in this case, Mr. Blaine has been ordered to pay only the amount specified by the support guidelines and nothing more. Under Motes and absent any particular findings, Allison's best interests are not served by the present arrangement. Accordingly, this Court should, consistent with Motes, award the tax dependency exemption to Ms. Bradshaw as custodian of Allison.

---

[7] Alternatively, if the guidelines do not embody an assumption about allocation of the tax exemption, to refer to them to establish the allocation would also be inappropriate. Unless it is assumed that the guidelines award the tax exemption to the custodial parent, the statute would unfairly burden the custodial parent with the added expense of providing for the child's needs which could not be anticipated by basing child support on income alone without compensating the custodian for these expenses by awarding her the tax exemption.

## CONCLUSION

This Court should determine that because it failed to make adequate findings (and lacked suitable factual determinations to support the required findings) and based its conclusion upon an ill-founded reading of Ut. Code Ann. § 78-45-7.2 (6), the trial court erred when it refused to make Mr. Blaine's increased child support obligation retroactive to April 22, 1991. In light of the substantial change in circumstances which had occurred before April 22, 1991, this Court should conclude that consideration of Allison's best interests and the ability of her parents to meet their support obligations requires that the increase be retroactive to the date upon which Mr. Blaine was served with the Ms. Bradshaw's petition.

This Court should also determine that, in this case, before a court can order Ms. Bradshaw to waive her right to claim Allison as a dependent for tax purposes, it must make the appropriate findings under Allred. In addition, this Court should hold that if sufficient grounds exist to allow a trial court to modify an existing child support amount to conform with the statutory guidelines, those same grounds mandate the reconsideration of an order allowing the non-custodial parent to claim a child as a dependent for the purposes of a tax exemption. Finally, this Court should

determine that Ms. Bradshaw is entitled to claim an exemption for Allison on her taxes. Because Mr. Blaine's support obligation is based upon the statutory guidelines which presume that the custodial parent is entitled to the tax exemption and there has been no showing that his obligation has been increased beyond the guidelines to account for the tax benefit he will receive, Allison's best interests are served by allowing her custodial parent to claim the exemption.

The decision of the trial court as to these two issues is manifestly in error and should be vacated. This Court should direct the trial court to enter an order requiring that Mr. Blaine's increased child support obligation be retroactive to April 22, 1991 to the amount of two hundred ninety-five dollars ($295.00) per month, (Findings, ¶ 10 at 4, Exhibit "B" attached), and that Allison's best interests will be served by awarding Ms. Bradshaw, as her custodian, the tax dependency exemption commencing in 1992.

DATED this 8th day of MARCH, 1993.

UTAH LEGAL CLINIC

by _____

BRIAN M. BARNARD
Attorney for Defendant
and Appellant

**EXHIBITS**

("A") Petition to Modify Decree, April 22, 1991.

("AA") Supplemental Petition to Modify, May 19, 1992.

("B") Amended Findings of Fact & Conclusions of Law, October 21, 1992.

("C") Order and Judgment, October 19, 1992.

("D") Notice of Appeal, October 30, 1992.

("E") Original Decree of Divorce, May 1, 1986.

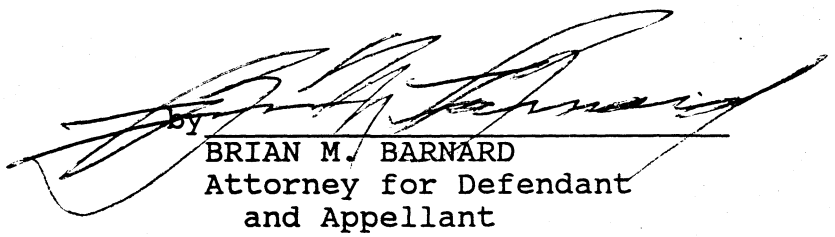
**CERTIFICATE OF MAILING**

I hereby certify that I caused to be mailed four (4) true and correct copies of the foregoing **APPELLANT'S BRIEF** and the with attachments to:

HARRY CASTON
McKAY, BURTON & THURMAN
Attorneys for Plaintiff
1200 Kennecott Building
10 East South Temple Street
Salt Lake City, Utah 84133

on the 8th day of MARCH, 1993, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC



By _____
BRIAN M. BARNARD
Attorney for Defendant
and Appellant

diva\bradshaw.cab

BRIAN M. BARNARD USB # 0215
JOHN PACE USB # 5624
UTAH LEGAL CLINIC
Attorneys for Defendant
214 East Fifth South
Salt Lake City, Utah 84111-3204
Phone: (801) 328-9531 or 328-9532

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY STATE OF UTAH

---

DAVID BlAINE,

Plaintiff,

vs.

PAMELA BRADSHAW BLAINE,

Defendant.

PETITION TO MODIFY DECREE

Civil No. 86-4900291

(Hon. Leonard H. Russon)

---

The defendant by and through counsel petitions and moves this court as follows:

1. The parties were divorced pursuant to a decree entered herein on May 2, 1986.

2. Since the entry of the decree there has been significant changes in the circumstances of the parties. The plaintiff has moved to the state of New York and is earning substantially more now than he was at the time the decree was entered. The cost of raising children has substantially increased since 1986.

EXHIBIT

"A"

3. The Utah Legislature has set specific child support guidelines which detail the child support obligations and requirements to be adequate for the care and maintenance of children.

4. It is reasonable, proper and necessary that the decree herein be modified so that the plaintiff's child support obligation and all of the terms relative to the care of the children be modified to comply with the current statutory guidelines.

5. It is reasonable, proper and necessary that the plaintiff be required to maintain a life insurance policy on his life in the sum of at least $100,000.00 (One Hundred Thousand Dollars) naming the minor children of the parties as beneficiaries during their minority and designating the defendant as the trustee to administer the proceeds for those policies.

WHEREFORE, the plaintiff demands that the decree be modified in conformance with the foregoing petition.

DATED this 22nd day of APRIL, 1991.

UTAH LEGAL CLINIC
Attorneys for Defendant

by _____
BRIAN M. BARNARD
JOHN PACE

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing PETITION TO MODIFY DECREE to:

HARRY CASTON
McKAY, BURTON & THURMAN
Attorneys for Plaintiff
1200 Kennecott Building
10 East South Temple Street
Salt Lake City, Utah 84133

on the 23rd day of APRIL, 1991, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Defendant

by _____
BRIAN M. BARNARD
JOHN PACE

BRIAN M. BARNARD USB # 0215
JOHN PACE USB # 5624
UTAH LEGAL CLINIC
Attorneys for Defendant
214 East Fifth South
Salt Lake City, Utah 84111-3204
Phone: (801) 328-9531 or 328-9532

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY STATE OF UTAH

| | |
|---|---|
| DAVID BLAINE,<br><br>Plaintiff,<br><br>vs.<br><br>PAMELA BRADSHAW BLAINE,<br><br>Defendant. | SUPPLEMENTAL PETITION TO MODIFY<br><br>Civil No. 86-4900291<br><br>(Hon. A. Stirba) |

The defendant Pamela Bradshaw (Blaine) by and through her counsel as a supplement to the pending petition for modification in the above matter presents this supplemental petition and hereby specifically requests that the defendant be allowed to claim the minor child of the parties as a dependant for income tax purposes in addition to the relief sought in her prior and pending petition for modification.

DATED this 6th day of MAY, 1992.

UTAH LEGAL CLINIC
Attorneys for Defendant

BY _____
BRIAN M. BARNARD
JOHN PACE

EXHIBIT
"AA"

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing SUPPLEMENTAL PETITION TO MODIFY to:

HARRY CASTON
Attorney for Plaintiff
McKAY, BURTON & THURMAN
1200 Kennecott Building
10 South Temple Street
Salt Lake City, Utah 84133

on the 18th day of MAY, 1992, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Defendant

By _____
BRIAN M. BARNARD
JOHN PACE

bradsupp.pet/asb/divay

BRIAN M. BARNARD USB # 0215
UTAH LEGAL CLINIC
Attorneys for Defendant
214 East Fifth South
Salt Lake City, Utah 84111-3204
Phone: (801) 328-9531 or 328-9532

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY STATE OF UTAH

---

| | | |
|---|---|---|
| DAVID BLAINE, | : | AMENDED FINDINGS OF FACT and CONCLUSIONS OF LAW |
| Plaintiff, | : | |
| vs. | : | Civil No. 86-4900291 |
| PAMELA BRADSHAW (BLAINE), | : | (Hon. Anne Stirba) |
| Defendant. | : | |

---

THE ABOVE CAPTIONED MATTER having come before the court for trial on defendant's Petition to Modify, the Hon. Anne Stirba, judge presiding, the hearing being held on September 3, 1992 at 9:30 a.m., plaintiff appearing in person and by and through counsel, Harry Caston, defendant appearing in person and by and through counsel, Brian M. Barnard, the parties having stipulated to the settlement of several issues, and then having submitted the remaining matters to the Court as legal issues, and the Court having on Friday, October 9, 1992 at 10:00 a.m. discussed with counsel the contents and terms of the Findings of Fact and Conclusions

EXHIBIT "B"

of Law to be entered herein and having made some amendments thereto, based thereon and for good cause appearing, the Court hereby makes and enters the following

FINDINGS OF FACT

1. The parties were divorced in 1986 when plaintiff was a full time college student and his income was less than eight hundred dollars (<$800.00) per month. Defendant was employed full time as a teacher at that time.

2. Since the divorce the plaintiff has completed his college education and is now employed full time by IBM in New York State earning three thousand eighty-one dollars ($3,081.00) per month.

3. Defendant currently earns one thousand sixty-five dollars ($1,065.00) per month working half time as a public school teacher.

4. The child of the parties was three (3) years old when the divorce occurred and is now nine (9) years of age. The cost of caring for a nine year old child today is greater than for caring for a three year old child six years ago.

5. The original decree entered May 2, 1986 provided that plaintiff would pay a maximum of two hundred and fifty

dollars ($250.00) per month in child support when his income exceeded one thousand two hundred and fifty dollars ($1,250.00+) per month. The original decree had provisions for escalation of child support as plaintiff's income increased, but contained no provision for escalation after plaintiff's income substantially exceeded one thousand two hundred and fifty dollars ($1,250.00) per month.

6. The original decree provided that for the years 1986 - 1989 inclusive the defendant could claim the child as a dependent and receive an exemption for income tax purposes. The original decree and existing order provided that for the year 1990 and each year thereafter the plaintiff could claim the child as a dependent and receive an exemption for income tax purposes. When the decree was entered the parties anticipated that in 1990 the plaintiff would be earning more than the defendant and that at that time he would have greater use for the dependency/exemption claim of the child.

7. The original decree made no provision for life insurance on either parties' life for the benefit of the child. The parties stipulated and agreed that the decree should be modified to require each party to maintain life insurance coverage on their own life in the sum of at least

one hundred thousand dollars ($100,000.00) naming the minor child as beneficiary during her minority naming the other party as trustee of those proceeds.

8. Plaintiff was served with the petition for modification on April 22, 1991.

9. In April, 1991 plaintiff was earning only two thousand eight hundred fifty-two dollars ($2,852.00) gross monthly salary working for IBM. In April, 1991 defendant was earning one thousand eight hundred seventy-three dollars ($1,873.00) gross per month working full-time as a school teacher.

10. Under the statutory support guidelines, in April, 1991, plaintiff's child support obligation to the defendant, if then re-calculated, would have been two hundred ninety-five dollars ($295.00) per month. Said sum represents less than a twenty-five percent (<25%) increase in plaintiff's support obligation under the guidelines from the existing court order ($250.00) in effect in April 1991.

11. On or about October 15, 1991, the plaintiff received an increase in his monthly gross income and since that date has been earning three thousand eighty-one dollars ($3,081.00) gross per month.

12. Plaintiff has accumulated arrears ($2,350.00) in child support based upon his non-payment as agreed to by the parties between August, 1989 and December 1991 inclusive, of the full amount ($250.) as required by the decree. That amount ($2,350.00) should be off-set against the equitable lien ($2,217.00) plaintiff had against the former marital home of the parties. Thus, there is a net balance due defendant from plaintiff for the sum of one hundred thirty-three dollars ($133.) representing the accumulated arrears less the equitable lien. The plaintiff's equitable lien should be extinguished. Plaintiff no longer has any claim or interest in the real property known as:

> Lots 1 and 2, Block 2, HOMESITE ADDITION, according to the official plat thereof, recorded in Book "F" of Plats at page 101 of the records of the Salt Lake County Recorder, State of Utah,

located in Salt Lake County, Utah and commonly known as: 555 East 2700 South, Salt Lake City, Utah 84106. Defendant should be granted a judgment against plaintiff in the sum of one hundred thirty-three ($133.00) dollars. With that judgment plaintiff's child support obligation through and including August, 1992 as provided for under the original decree has been satisfied.

13. Defendant claimed in her Petition to Modify that there was a substantial change in circumstances which

allowed the Court to reconsider and increase child support as well as to allow the court to re-consider and modify the decree with regard to which parent could claim the child as a dependent for income tax purposes. The parties agreed that there was a substantial change in circumstances which allowed the Court to reconsider and increase child support.

14. Other than the foregoing, defendant presented no evidence to show a change in circumstances of the parties or to justify increasing child support or altering the award of the tax dependency exemption allowance.

15. The parties stipulated that all of the foregoing facts were true and correct for the purpose of settlement and for the purpose of presentation to the Court of various pending legal issues as raised by the pleadings on file.

16. The defendant incurred court costs in the pursuit of her petition to modify.

BASED UPON THE FOREGOING and for good cause appearing, the Court makes and enters the following

CONCLUSIONS OF LAW

1. The court has subject matter jurisdiction and personal jurisdiction over the parties.

2. The plaintiff's child support obligation should be increased in light of a legally sufficient substantial change in circumstances set forth in the findings of fact.

3. The substantial change in circumstances of the parties set forth above justifies modification of plaintiff's child support obligation. Under the statutory guidelines based upon the parties' current incomes and incomes as of October 15, 1991, plaintiff's child support obligation has increased by more than twenty-five per cent (>25%) over his obligation provided in the existing order. Pursuant to Ut. Code Ann. § 78-45-7.2 (6) (1953 as amended) in light of that twenty-five percent (>25%) increase, the plaintiff's child support obligation should be increased to the sum of three hundred twenty-two dollars ($322.00) per month.

4. The increased child support set forth in the foregoing paragraphs is in conformance with and is based upon the statutory guidelines, Ut. Code Ann. § 78-45-7.14 (1953 as amended). The sum of three hundred and twenty-two dollars ($322.00) per month is the exact amount provided under said guidelines. Under the guidelines said sum ($322.00) represents seventy-six (76%) of the necessary

support amount established by the guidelines based upon the combined incomes of the parties.

5. Because the increase in plaintiff's salary to three thousand eighty-one dollars ($3,081.00) gross per month occurred on October 15, 1991, the increase in plaintiff's child support obligation should be retroactive, pursuant to Ut. Code Ann. § 30-3-10.6 (2) (1953 as amended), only to October 15, 1991.

6. The child support shall not be retroactive to when the plaintiff was served with the Petition for Modification (April 22, 1991) because as of that date based upon the parties' respective incomes at that time the increase in child support under the guidelines was less than one hundred twenty-five percent (<125%) of plaintiff's support obligation under the existing order. A substantial change of circumstances for the purpose of increasing child support does not occur unless there is an increase of at least twenty-five percent (25%) from the existing court ordered amount to the proposed new increased amount of support. Ut. Code Ann. § 78-45-7.2 (6) (1953 as amended). Based upon the foregoing, the increase in child support should not be retroactive to April 22, 1991, but only to October 15, 1991.

7. Plaintiff owes to defendant ten (10) months at $72.00 per month (November, 1991 - through August, 1992 inclusive) plus $36.00 for one/half of the month of October, 1991 for a total of seven hundred fifty-six dollars ($756.00) as a result of the retroactive effect of the child support increase. Defendant should be granted a judgment for that amount against plaintiff.

8. There has not been a substantial change in circumstances of the parties sufficient to warrant altering the portion of the existing decree which awards to plaintiff the right to claim the minor child of the parties as a dependent and thus claim an exemption for income tax purposes.

9. Based upon the stipulation of the parties, each party should be ordered to secure and maintain one hundred thousand dollars ($100,000.00) in life insurance on their respective lives, naming the minor child as the beneficiary during her minority naming the other party as trustee of those proceeds.

10. Plaintiff's accumulated arrears ($2,350.00) in child support should be off-set against the equitable lien ($2,217.00) plaintiff has against the former marital home of the parties. Thus, there is a net balance due defendant from plaintiff for the sum of one hundred thirty-three

dollars ($133.00) representing the difference between the accumulated arrears and plaintiff's equitable lien. Plaintiff's equitable lien should be extinguished. Plaintiff shall no longer have any lien, claim or interest in the real property known as:

> Lots 1 and 2, Block 2, HOMESITE ADD-ITION, according to the official plat thereof, recorded in Book "F", of Plats at page 101, records of the Salt Lake County Recorder, State of Utah,

located in Salt Lake County, Utah and commonly known as: 555 East 2700 South, Salt Lake City, Utah 84106. Defendant should be granted a judgment against plaintiff in the net sum of one hundred thirty-three ($133.00) dollars, thereupon plaintiff's child support obligation through and including August, 1992 as provided for under the original decree will be satisfied.

11. Defendant is entitled to an award of her costs pursuant to Rule 54 (d)(1), Ut.R.Civ.Pro.

12. An order and judgment should be entered in conformance with the foregoing amended findings and conclusions.

DATED this 21ST day of OCTOBER, 1992.

BY THE COURT:

/S/

ANNE STIRBA
JUDGE

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed and fax'd a correct copy of the foregoing AMENDED FINDINGS OF FACT and CONCLUSIONS OF LAW to:

HARRY CASTON
McKAY, BURTON & THURMAN
Attorneys for Plaintiff
1200 Kennecott Building
10 East South Temple Street
Salt Lake City, Utah 84133

on the 9th day of October, 1992, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Defendant

by _____
BRIAN M. BARNARD
JOHN PACE

diva\hlrj\bradfin3.mod \ bmb

BRIAN M. BARNARD USB # 0215
UTAH LEGAL CLINIC
Attorneys for Defendant
214 East Fifth South
Salt Lake City, Utah 84111-3204
Phone: (801) 328-9531 or 328-9532

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY STATE OF UTAH

| | | |
|---|---|---|
| DAVID BLAINE,<br>Plaintiff,<br>vs.<br>PAMELA BRADSHAW (BLAINE),<br>Defendant. | : | ORDER AND JUDGMENT<br><br>Civil No. 86-4900291<br><br>(Hon. Anne Stirba) |

THE ABOVE CAPTIONED MATTER having come before the court for trial on defendant's Petition to Modify, the Hon. Anne Stirba, judge presiding, the hearing being held on September 3, 1992 at 9:30 a.m., plaintiff appearing in person and by and through counsel, Harry Caston, defendant appearing in person and by and through counsel, Brian M. Barnard, the parties having stipulated to the settlement of several issues, and then having submitted the remaining matters to the Court as legal issues, the Court having previously made



EXHIBIT "C"

and entered its Findings of Fact and Conclusions of Law, based thereon and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. The plaintiff's child support obligation is increased in light of a legally sufficient substantial change in circumstances set forth in the findings of fact.

2. The plaintiff's child support obligation is increased to the sum of three hundred twenty-two dollars ($322.00) per month.

3. The increase in plaintiff's child support obligation is retroactive, pursuant to Ut. Code Ann. § 30-3-10.6 (2) (1953 as amended) to October 15, 1991. As a result of the retroactive effect of the child support increase, defendant is granted a judgment against plaintiff for the sum of ($756.00) seven hundred fifty-six dollars.

4. The request of defendant to make the increased child support retroactive to when the plaintiff was served with the Petition for Modification (April 22, 1991) is denied.

5. The request of defendant to alter the portion of the existing decree which awards to plaintiff the right to

claim the minor child of the parties as a dependent and thus claim an exemption for income tax purposes is denied.

6. Each party is ordered to secure and maintain one hundred thousand dollars ($100,000.00) in life insurance on their respective lives, naming the minor child as the beneficiary during her minority naming the other party as trustee of those proceeds.

7. Plaintiff's accumulated arrears ($2,350.00) in child support is off-set against the equitable lien ($2,217.00) plaintiff has against the former marital home of the parties. Plaintiff's equitable lien is extinguished. Plaintiff no longer has any lien, claim or interest in the real property known as:

> Lots 1 and 2, Block 2, HOMESITE ADDITION, according to the official plat thereof, recorded in Book "F", of Plats at page 101, records of the Salt Lake County Recorder, State of Utah,

located in Salt Lake County, Utah and commonly known as: 555 East 2700 South, Salt Lake City, Utah 84106.

Defendant is granted a judgment against plaintiff in the net sum of one hundred thirty-three ($133.00) dollars, whereupon plaintiff's child support obligation through and including August, 1992 as provided for under the original decree is found to be satisfied.

12. Defendant is awarded her costs pursuant to Rule 54 (d)(1), Ut.R.Civ.Pro. in the sum of fifty-six dollars ($56.00).

DATED this 19th day of October, 1992.

BY THE COURT:

/s/
ANNE STIRBA
JUDGE

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a correct copy of the foregoing ORDER AND JUDGMENT to:

HARRY CASTON
McKAY, BURTON & THURMAN
Attorneys for Plaintiff
1200 Kennecott Building
10 East South Temple Street
Salt Lake City, Utah 84133

on the 10th day of September, 1992, on the 1st day of October, and on the 9th day of October, 1992 postage prepaid in the United States Postal Service and by fax on October 9, 1992.

UTAH LEGAL CLINIC
Attorneys for Defendant

by
BRIAN M. BARNARD
JOHN PACE

diva\hlrj\bradfin3.mod \ bmb

BRIAN M. BARNARD USB # 0215
UTAH LEGAL CLINIC
Attorneys for Defendant
214 East Fifth South
Salt Lake City, Utah 84111-3204
Phone: (801) 328-9531 or 328-9532

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY STATE OF UTAH

| | | |
|---|---|---|
| DAVID BLAINE,<br>Plaintiff,<br>vs.<br>PAMELA BRADSHAW (BLAINE),<br>Defendant. | : | NOTICE OF APPEAL<br><br>Civil No. 86-4900291<br><br>(Hon. Anne Stirba) |

THE DEFENDANT by and through counsel, Brian M. Barnard hereby gives notice of her appeal in the above captioned matter of the decision, ruling and order of the Court entered as a result of the hearing September 3, 1992 at 9:30 a.m., denying to defendant certain relief requested in plaintiff's petitions for modification, to-wit:

(a) Denying the request of defendant to make the increased child support retroactive to when the plaintiff was served with the Petition for Modification (April 22, 1991); and,

EXHIBIT "D"

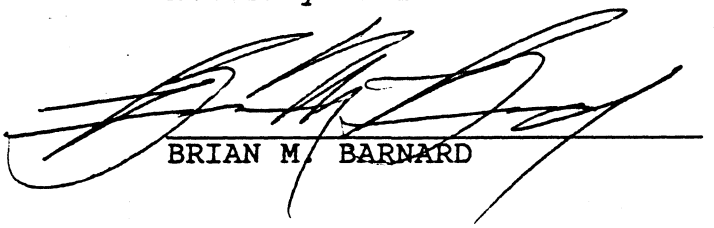
(b) Denying the request of defendant to alter the portion of the existing decree which awards to plaintiff the right to claim the minor child of the parties as a dependent and thus claim an exemption for income tax purposes is denied.

Said rulings are embodied in Amended Findings of Fact and Conclusions of Law and an Order and Judgment dated October 21st, 1992 and October 19, 1992 respectively.

This appeal is to the Utah Court of Appeals.

DATED this 30th day of October, 1992.

UTAH LEGAL CLINIC
Attorneys for Defendant



BRIAN M. BARNARD

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a correct copy of the foregoing NOTICE OF APPEAL to:

HARRY CASTON
McKAY, BURTON & THURMAN
Attorneys for Plaintiff
1200 Kennecott Building
10 East South Temple Street
Salt Lake City, Utah 84133

on the 30th day of October, 1992, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Defendant

By _____
BRIAN M. BARNARD
JOHN PACE

diva\hlrj\bradappc.not\bmb

JUDGMENT

MAY - 1 1986

Evelyn Thompson

LAURA L. BOYER - 3767
Attorney for Plaintiff
3167 West 4700 South
West Valley City, Utah 84118
Telephone: (801) 964-6100

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

----ooOOoo---- BK 206 NO. 2750
5-2-86 - 8:28 Am

| | |
|---|---|
| DAVID BLAINE,<br>Plaintiff,<br><br>vs<br><br>PAMELA BRADSHAW BLAINE,<br>Defendant. | DECREE OF DIVORCE<br><br>Civil No. D86-291<br><br>Judge Leonard H. Russon |

----ooOOoo----

THIS MATTER came on regularly to be heard before the above court, sitting without a jury, the Honorable Leonard H. Russon, presiding, this 1st day of May, 1986. The plaintiff was present in court, and represented by his counsel, Laura L. Boyer. The defendant did not appear, but having previously entered her Entry of Appearance, Waiver, and Stipulation filed herein, her default has been entered. The court, having heard the evidence and reviewed all pleadings on file herein, and entered its Findings of Fact and Conclusions of Law, it is hereby:

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff is granted a Decree of Divorce, the same to become final and absolute upon entry.

2. CHILD CUSTODY, VISITATION, SUPPORT: During their

EXHIBIT "D"

marriage one (1) child has been born to the parties; to wit: ALLISON BLAINE, born February 14, 1983. The defendant is awarded her care, custody, and control, subject to the plaintiff's liberal rights of visitation and summer visits, provided the plaintiff gives to defendant at least twenty-four (24) hours notice of his intent to exercise his rights of visitation, said visitations to include, but not be limited to, the following: two (2) days per week out of Monday, Tuesday, Wednesday, and Thursday, with one preceding night; one day and night per weekend, to alternate each week between Saturday and Sunday; beginning December 24, 1986, and each alternating year, Christmas Eve through December 25 at 11:00 a.m.; 1/2 day on Allison's Birthday; alternating other holidays, and, in the event either party resides outside Salt Lake County, one (1) continual summer month (or two (2) two week periods, split up).

3. Plaintiff is ordered to pay to defendant, on or before the first day of each month, temporary and permanent child support in the amount of One hundred twenty-five dollars ($125.00) per month. Said child support shall automatically escalate (without the necessity of court intervention) if and when plaintiff's income increases as follows: between eight hundred thirty-three dollars ($833.00) to one thousand two hundred fifty dollars ($1,250.00) gross income per month, the support shall be two hundred dollars ($200.00) per month; and, above one thousand two hundred fifty dollars ($1,250.00) the support shall be two hundred fifty dollars ($250.00). Plaintiff shall supply defendant with Form 1040, by May 1, of

following year as proof of income.

4. Plaintiff's child support obligation should continue until said child reaches age eighteen (18) or until the end of the school year in which she has reached the age of eighteen (18), provided that it should terminate at an earlier age, if the child has become otherwise emancipated, or at a later age if the child remains dependent by reason of physical or mental disease or defect.

5. MEDICAL INSURANCE AND EXPENSES: Defendant is ordered to maintain coverage for the said child of the parties under a policy of major medical insurance for so long as the child is within the age limits allowed by the policy. If the same becomes unavailable to defendant, she should provide plaintiff with notice thereof.

6. Each party is ordered to pay one-half (1/2) of all medical, dental orthodontic, and optical expenses which are not covered by insurance necessarily incurred for their minor child.

7. ALIMONY: Neither party is awarded alimony.

8. HOME: The real property of the parties, situated at 555 East 2700 South, Salt Lake City, State of Utah is awarded to the defendant. Plaintiff is ordered to sign a quit-claim deed conveying the above-described property to defendant subject to a lien in the amount of Two Thousand Two Hundred and Seventeen Dollars ($2,217.00), and subject to defendant assuming all known liabilities on this property, holding plaintiff harmless for any liability thereon.

9. Said aforementioned lien is ordered to be paid by

defendant to plaintiff upon the first of the following conditions to occur: rental or sale of the home; or within ten (10) years after divorce decree entered herein.

10. ASSETS: During their marriage the parties acquired household furniture, fixtures, furnishings and appliances which have been equitably divided between themselves and which are awarded pursuant to this division.

11. Each party is awarded his or her personal effects.

12. DEBTS AND OBLIGATIONS: Each party is ordered to assume and pay all obligaions incurred by him or her after the separation of the parties.

13. TAXES: Defendant is entitled to claim the minor child as dependency exmptions for income tax purposes up to and including 1989. Plaintiff is entitled to claim the minor child of the parties as dependency exemption from 1990 and beyond.

14. VEHICLES: The vehicles of the parties are awaded as follows: to plaintiff, the 1977 Subaru GF; to defendant, the 1983 Subaru GL, subject to her assuming and paying the liabilities thereon and holding plaintiff harmless for any liability thereon.

15. ATTORNEY'S FEES AND COSTS: Plaintiff is ordered to assume and pay his own attorney's fees and costs incurred herein.

16. DOCUMENTS AND LOCATION: Each party is ordered to duly execute and deliver all documents necessary to effect the Decree of Divorce.

DATED this 1st day of May, 1986.

BY THE COURT:

Leonard H. Russon, Judge

ATTEST
M. DIXON HINDLEY
Clerk
By Dudley Thompson
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Decree of Divorce were mailed, postage prepaid, to the Defendan PAMELA BRADSHAW BLAINE, at her last known address of 555 East 2700 South, Salt Lake City, Utah 84106 on the 9 day of April, 1986.

Zina Davis